

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF DELAWARE

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff/Respondent,	)	
	)	Criminal Action No. 96-60-SLR
v.	)	Civil Action No. 99-729-SLR
	)	
ORLANDO FOREMAN,	)	
	)	
Defendant/Petitioner.	)	
	)	

**MEMORANDUM ORDER**

**I. INTRODUCTION**

Petitioner Orlando Foreman is an inmate at the Federal Correctional Institution in White Deer, Pennsylvania. (D.I. 42) Currently before the court is petitioner's motion for review and correction of sentence pursuant to 28 U.S.C. § 2255. (D.I. 40) The court shall deny petitioner's motion because it is barred by the statute of limitations.

**II. BACKGROUND**

On August 22, 1996, petitioner pled guilty to one count of possession of a firearm by a felon in violation of 18 U.S.C. § 922(g)(1).<sup>1</sup> (D.I. 9) On November 7, 1996, the court sentenced petitioner to 235 months imprisonment, and judgment was entered onto the docket on November 12, 1996. (D.I. 25) On July 19, 1999, petitioner filed a notice of appeal to the Third Circuit.

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<sup>1</sup>During a hearing on November 1, 1996, petitioner submitted a supplement to the original memorandum of plea agreement that changed his status to that of an "Armed Career Criminal." (D.I. 26)

(D.I. 36) On October 28, 1999, petitioner filed a pro se petition for writ of habeas corpus pursuant to 28 U.S.C. § 2255.

(D.I. 40) On August 30, 2000, the Third Circuit dismissed plaintiff's appeal due to a jurisdictional defect. (D.I. 43)

### **III. DISCUSSION**

Effective April 24, 1996, the Antiterrorism and Effective Death Penalty Act ("AEDPA"), Pub. L. No. 104-132, 110 Stat. 1214 (1996)<sup>2</sup> amended 28 U.S.C. § 2255 to impose a one-year statute of limitations on the filing of a Section 2255 motion by a federal prisoner. See 28 U.S.C. § 2255; Miller v. New Jersey State Dep't of Corrs., 145 F.3d 616, 619 n.1 (3d Cir. 1998) (holding that one-year limitations period set forth in Section 2255 is statute of limitations subject to equitable tolling, not jurisdictional bar). The one-year limitations period begins to run from the latest of:

- (1) the date on which the judgment becomes final;
- (2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action;
- (3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

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<sup>2</sup>Since petitioner's sentence was imposed on November 7, 1996 and he filed his Section 2255 motion in October 1999, AEDPA applies to petitioner without any retroactivity problem. See Lindh v. Murphy, 521 U.S. 320 (1997).

(4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

28 U.S.C. § 2255.

In the instant action, petitioner's motion is governed by subsection one of Section 2255. Petitioner was sentenced on November 7, 1996 and judgment was entered onto the docket on November 12, 1996. See United States v. Hashagen, 816 F.2d 899, 901 (3d Cir. 1987) (stating that a "sentence [is] reduced to judgment when a judgment and commitment order [is] filed"). Although petitioner had the right to appeal the court's judgment of conviction, he was required to do so within ten (10) days after entry of judgment. Fed. R. App. P. 4(b)(1)(A)(i). Thus, petitioner was obligated to file and serve his notice of appeal by November 22, 1996. Fed. R. App. P. 26. Because petitioner failed to file a timely notice of appeal, his judgment of conviction became final on November 22, 1996, the date on which the time for filing a direct appeal expired.<sup>3</sup> See Kapral v. United States, 166 F.3d 565, 577 (3d Cir. 1999) ("If a defendant does not pursue a timely direct appeal to the court of appeals, his or her conviction and sentence become final, and the statute of limitation begins to run, on the date on which the time for filing such an appeal expired."). Applying the standard set

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<sup>3</sup>Petitioner did file an appeal to the Third Circuit on July 19, 1999, which was dismissed for jurisdictional defect. (D.I. 43) The court stayed consideration of petitioner's application pending the outcome of his appeal.

forth in subsection one of Section 2255, the statute of limitations with respect to petitioner began to run on November 22, 1996 and expired one year later on November 21, 1997. Petitioner filed the instant Section 2255 motion on October 28, 1999, well after the end of the limitations period. Consequently, his petition is time-barred.

#### **IV. CONCLUSION**

Therefore, at Wilmington, this 15th day of February, 2001;

IT IS ORDERED that:

1. Petitioner's motion for review and correction of sentence pursuant to 28 U.S.C. § 2255 (D.I. 40) is denied.

2. For the reasons stated above, petitioner has failed to make a "substantial showing of the denial of a constitutional right," 28 U.S.C. § 2253(c)(2), and a certificate of appealability is not warranted. See United States v. Eyer, 113 F.3d 470 (3d Cir. 1997); 3rd Cir. Local Appellate Rule 22.2 (1998).

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United States District Judge